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No. _____

In The
Supreme Court of the United States

GUSTO RECORDS, INC.; G.M.L., INC.;
NASHVILLE QUALITY DUPLICATION, INC.;
INTERNATIONAL MARKETING GROUP, INC.,

Petitioners,

v.

DONALD M. DAILY and HAROLD W. DAILY, JR.,
Individually and As Independent Co-Executors of
The Estates of Mr. and Mrs. Harold W. "Pappy" Daily;
GLAD MUSIC COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

I. Whether the Sixth Circuit's award of $1 in nominal damages and affirmance of a punitive damage award of $739,750, resulting in a ratio of 739,750-to-1, violates the Due Process rights of Petitioners as set forth in BMW of North America, Inc. v. Gore?

PARTIES TO THE PROCEEDING

Petitioners GML, Inc., Gusto Records, Inc., Nashville Quality Duplication Inc., and International Marketing Group, Inc., submit that there are no parent or publicly held companies that own more than 10% of each company's stock.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a Writ of Certiorari to review the decision entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 2001 U.S. App. LEXIS 16134 (6th Cir. July 17, 2001) and is reprinted in the Appendix ("App.") to this petition at App. 5-28. The Sixth Circuit's Order denying Petitioners' petition for panel rehearing and suggestion of rehearing en banc is unreported and is reprinted at App. 1-4. The judgment entered by the United States District Court for the Middle District of Tennessee awarding punitive damages against Petitioners is unreported and is reprinted at App. 29-39. The judgment entered by the United States District Court for the Middle District of Tennessee awarding compensatory damages against Petitioners is unreported and is reprinted at App. 40-42.

STATEMENT OF JURISDICTION OF THE COURT

On July 17, 2001, the Sixth Circuit entered the opinion from which review is sought. (See App. 5-28). On October 1, 2001, the Sixth Circuit denied Petitioners' petition for panel rehearing and suggestion of rehearing en banc. (See App. 1-4). Petitioners invoke jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) and seek the issuance of the Writ of Certiorari pursuant to Supreme Court Rule 10(a) because by affirming an award of punitive damages that is 739,750 times greater than the underlying nominal damages award, the Sixth Circuit entered a decision in conflict with this Court's decision in BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S. Ct. 1589, 134 L. Ed.2d (1996), on the same important matter. Further, by affirming an award

of punitive damages for a claim of conspiracy to defraud where the plaintiff failed to prove actual damages, the Sixth Circuit departed from the accepted and usual course of judicial proceedings. The Sixth Circuit's decision in this case calls for an exercise of this Court's supervisory powers.

RELEVANT CONSTITUTIONAL PROVISION

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

STATEMENT OF THE CASE

Petitioners GML, Inc. ("GML"), Gusto Records, Inc. ("Gusto"), Nashville Quality Duplicating, Inc. ("NQD") and International Marketing Group, Inc. ("IMG") (GML, Gusto, NQD, and IMG shall be collectively referred to as the "Gusto Defendants"), respectfully seek review of a decision entered by the United States Court of Appeals for the Sixth Circuit. The basis for jurisdiction in the United States District Court for the Middle District of Tennessee was 28 U.S.C. §1338 because this civil action arises under the copyright laws of the United States.

This case arises out of an action brought to collect royalties. At trial, the jury found in favor of Respondents and awarded damages for, *inter alia*, conspiracy to defraud.

(See App. 42). Specifically, the jury awarded Respondents $165,000 in compensatory damages for their conspiracy claim. (See App. 42). After further testimony, the jury awarded Respondents an additional $739,750 in punitive damages against the Gusto Defendants for their alleged conspiracy to defraud. (See App. 36-37).

On appeal, the Sixth Circuit found that Respondents failed to present sufficient evidence to support the $165,000 in compensatory damages awarded on the conspiracy to defraud claim. (See App. 23-24). Despite the fact that Respondents failed to prove an essential element of their claim, i.e., damages, the Sixth Circuit vacated the compensatory damage award and reduced it to $1 in nominal damages. (See App. 24). Accordingly, on the conspiracy to defraud claim, the Gusto Defendants are left with liability for $1 in nominal damages and $739,750 in punitive damages.

The Sixth Circuit's decision, therefore, results in an award of punitive damages, which, if the Gusto Defendants pay the entire $1.00 in nominal damages, results in a ratio of $739,750 to 1. If each one of the Gusto Defendants were to pay an equal share of the $1 damage award ($.20 for each of the Gusto Defendants and $.20 allocated to Highland Music, Inc.) the ratio is as listed below:

Defendant	Punitive	Nominal	Ratio
GML	$250,000	$.20	1,000,000 to 1
Gusto	$250,000	$.20	1,000,000 to 1
NQD	$31,250	$.20	125,000 to 1
IMG	$208,500	$.20	834,000 to 1

REASONS FOR GRANTING THE WRIT

I. The Punitive Damage Award Issued In This Case Is Grossly Excessive And Violates The Due Process Clause As Set Forth By This Court In BMW of North America, Inc. v. Gore.

This Court has held that an excessive award of punitive damages can violate the Fourteenth Amendment. See BMW of North America, Inc. v. Gore, 517 U.S. 559, 134 L. Ed.2d, 116 S. Ct. 1589 (1996). The Due Process Clause "prohibits the States from imposing 'grossly excessive' punishments on tortfeasors." Cooper Indus., Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 121 S. Ct. 1678, 1684, 149 L. Ed.2d 674 (2001) (citing BMW, 517 U.S. at 562; TXO Production Corp. v. Alliance, 509 U.S. 443-, 453-455, 125 L. Ed.2d 366, 113 S. Ct. 2711 (1993) (plurality opinion)).

Although this Court has declined to impose a "bright-line rule" establishing when a punitive damage award is excessive, the Court has held that an award of "more than 4 times the amount of compensatory damages might be close to the line" although it did not "cross the line into the area of constitutional impropriety." BMW, 517 U.S. at 581 (internal quotation marks and citation omitted). In BMW, the punitive damage award was 500 times the amount of compensatory damages. Id. at 582. The Supreme Court stated that a 500 to 1 ratio is "breathtaking" and, thus, raised a "suspicious judicial eyebrow." Id., at 583.

The Court has developed three "guideposts" to be used in reviewing constitutional challenges to large punitive damage awards: (1) "the degree of reprehensibility" of the conduct; (2) "the disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damage award;" and (3) "the difference between [the punitive damages] and the civil penalties authorized or imposed in comparable cases." Id., at 575. Petitioners submit that

application of the BMW factors to this case should have resulted in a finding that the punitive damage award is excessive and violates the Fourteenth Amendment.

A. No Court Has Articulated What Actions Petitioners Took, Or What Conduct They Engaged In, To Justify A Finding Of Reprehensibility.

This Court has held that "perhaps the most important indicium of the reasonableness of a punitive damage award is the degree of reprehensibility of the defendant's conduct." BMW, 517 U.S. at 575. In the present case, no court has articulated what actions Petitioners took, or what conduct they engaged in, to justify a finding of the level of reprehensibility necessary to support a punitive damage award that is 739,750 times greater than the underlying nominal damages award.

This Court has held that whether a punitive damage award meets the constitutional requirements of BMW "merits a *de novo* review." Cooper Industries, 121 S. Ct. at 1685-86. Although the Sixth Circuit stated in its opinion denying Petitioners' Petition for Rehearing *En Banc* that "[w]e are more than satisfied that the record demonstrates a high degree of reprehensibility on the part of each of the defendants" (App. 2), the court failed to articulate what in the record demonstrated reprehensibility.

Further, in its opinion from which Petitioners have appealed, the Sixth Circuit stated that it agreed with the district court "that the evidence was sufficient to support the finding, by clear and convincing evidence, that the defendants each acted intentionally, recklessly, maliciously, or fraudulently in conspiring to defraud the plaintiffs." (App. 25). Neither the Sixth Circuit nor the district court articulated, however, what evidence in the record supported a finding of reprehensibility. Petitioners submit that the Sixth Circuit failed to give the record in this case the required *de novo* review, or, in the alternative, failed to

articulate what in the record supported a finding of a "high degree of reprehensibility on the part of each of the defendants." (App. 2).

This Court held in BMW that a $2 million punitive damage award was unconstitutional because, *inter alia*, the harm inflicted on the plaintiff was "purely economic." BMW, 517 U.S. at 576. According to the Court, "BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others." Id. The Court stated that although economic injury can warrant punitive damages in certain cases, all acts that cause economic harm are not torts that are "sufficiently reprehensible to justify a significant sanction in addition to compensatory damages." Id. Because the record in BMW was devoid of "deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive," the Court found that BMW's conduct was "not sufficiently reprehensible to warrant imposition of a $ 2 million exemplary damages award." Id. at 579-80.

Similarly, in In re The Exxon Valdez, 270 F.3d 1215, 2001 U.S. App. LEXIS 24029 at *82 (9th Cir. Nov. 7, 2001), the Ninth Circuit Court of Appeals held that a $5 billion punitive damage award was "too high" to withstand the review required under BMW and Cooper Industries. In examining Exxon's conduct to determine whether there was sufficient evidence of reprehensibility, the court noted that:

> as bad as the oil spill was, Exxon did not spill the oil on purpose, and did not kill anyone. By contrast, in Protectus Alpha[Navigation Co. v. North Pacific Grain Growers, Inc., 767 F.2d 1379, 1381-82 (9th Cir. 1985)] a man was forseeably killed by a deliberate act. And in Hilao v. Estate of Marcos, [103 F.3d 767, 771 (9th Cir. 1996)] a $1.2 billion punitive damage award, the defendant intentionally caused thousands of people to be tortured and killed.

Exxon, 2001 U.S. App. LEXIS 24029 at *69 (footnotes omitted). The Ninth Circuit court concluded that, in comparison to cases where there was evidence that the defendant's conduct caused physical harm and even death, Exxon's conduct could not justify a punitive damage award that resulted in a ratio between "12 to 1 and 17 to 1." Id. at *72, 82.

In Boeken v. Phillip Morris Inc., No. BC 226593, at p. 13 (Ca. Supr. Ct. Aug. 9, 2001), the court rejected a punitive damage award of 540-to-1 as excessive, and held that a 20-to-1 ratio was more appropriate. In that case, the defendant, Phillip Morris, was held liable for punitive damages because, *inter alia*, it engaged in a "nationwide pattern of deceit" that caused significant harm to the health and well-being of millions of Americans. Specifically, the court found that Phillip Morris had engaged in conduct that was designed to mislead millions of Americans into believing that nicotine in cigarettes was not addictive -- even though Phillip Morris knew that it was -- and that cigarettes did not cause cancer -- even though Phillip Morris knew that they did. The court found that this evidence supported a finding that Phillip Morris's conduct was "reprehensible in every sense of the word, both legal and moral." Id. at 7.

Despite the court's finding of reprehensibility, it found that a 540-to-1 punitive damage award was "legally excessive." Id. at 13. Although the court stated that it could not know with certainty what ratio would be correct, it found that "a ratio of approximately 20-to-1" was more appropriate under the particular circumstances. Id.

In the present case, there is no evidence of violence of the part of the Petitioners, no evidence that they threatened the health or safety of others, and no evidence of intentional trickery or deceit. Rather, the only misconduct described by the Court on the Petitioners' part was that they:

> engaged in a series of transactions involving transfers of the title and ownership of the masters, which tended to impede Plaintiffs' discovery of the amount of producer's royalties to which they were entitled. * * * In addition, the Defendant companies failed to maintain the kind of information and financial records concerning their business operations and exploitation of the masters from which Plaintiffs or others could determine the volume of licenses and/or sales, the sales price of products, the profits derived, and the amounts of producer's royalties owed.

(App. 33-34).

None of the courts that have considered this issue have articulated how the master recordings were transferred, how any alleged transfer mislead plaintiffs, how plaintiffs attempted to "discover" the amount of royalties due, what type of records should have been maintained or who among the defendants was obligated to maintain the type of information described. Surely Petitioners' conduct in this case – even if supported by the record – in failing to maintain proper business records, is no more reprehensible than Exxon's conduct in spilling eleven million gallons of oil into the Prince William Sound and thereby killing and injuring a significant amount of Alaskan fish and wildlife. Thus, if the defendants' conduct in Exxon was not reprehensible enough to support a punitive damages award with a ratio between 12 to 1 and 17 to 1, then Petitioners' conduct in this case cannot be found to represent the level of reprehensibility necessary to support a punitive damage award that has resulted in a ratio of 739,750 to 1.

Likewise, Petitioners' conduct, however reprehensible, cannot rise to the level and degree of Phillip Morris's reprehensibility in intentionally deceiving the American public as a whole into believing that cigarettes were not harmful. If the punitive damage award assessed against Phillip Morris, which resulted in a ratio of 540-to-1, was legally excessive, then the punitive damage award assessed against the Petitioners in this case, which resulted in the significantly higher ratio of 739,750-to-1, must also be excessive.

The lack of reprehensibility is further highlighted by the fact that Petitioners did business with Respondents for several years during which the parties negotiated an agreement under which Petitioners would pay Respondents publishing royalties at half of the statutory rate. (See App. 8). Thus, Respondents' claim that Petitioners engaged in a conspiracy to mask the ownership of the master recordings at issue in this case is logically inconsistent with the undisputed fact that Respondents negotiated and entered into agreements with Petitioners for the payment of royalties and the parties conducted business according to their agreement for many years.

B. There Was No Evidence That The Respondents Suffered Any Actual Harm As A Result Of The Alleged Conspiracy To Defraud.

Further, although the jury found that the Gusto Defendants intentionally conspired against Respondents, there was no evidence that Respondents suffered any *actual harm* as a result of the alleged conspiracy. Because the conspiracy claim provides the only substantive predicate for an award of punitive damages, this Court must examine whether Respondents' failure to prove actual damages as a result of the alleged conspiracy undermines the basis for the jury's substantial punitive damage award.

A civil conspiracy is a "combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means." Braswell v. Carothers, 863 S.W.2d 722, 727 (Tenn. Ct. App. 1993). A civil conspiracy *alone* does not give rise to a claim on which damages may be awarded. In Tennessee, as in most jurisdictions, injury to person or property, resulting in actual damage, must also exist." Id., (emphasis added).

In this case, Respondents alleged that the Gusto Defendants participated in a conspiracy to defraud them out of certain royalties. (See App. 6). Although the jury found that a conspiracy existed, a civil conspiracy is not itself actionable absent proof of an underlying tort. Because the gravamen of Respondents' civil conspiracy claim is that the Gusto Defendants participated in a conspiracy to defraud them out of certain royalties, Respondents had to prove they suffered *actual damages*, which is an essential element to recovery in an action for fraud. See, e.g., Harrogate Corp. v. Systems Sales Corp., 915 S.W.2d 812, 817 (Tenn. Ct. App. 1995).

The Sixth Circuit found that Respondents failed to present evidence of actual damage. At trial, Petitioners moved for a directed verdict on this issue at the close of Respondents' evidence, but their motion was denied. (See App. 13). On appeal, the Sixth Circuit held that "the evidence was insufficient to support the *amount* of compensatory damages awarded for conspiracy to defraud." (See App. 24). Instead of vacating the entire judgment on the conspiracy to defraud claim, however, the Sixth Circuit ordered the district court to award Respondents $ 1.00 in nominal damages for the alleged conspiracy to defraud and affirmed the corresponding punitive damage award. (See App. 24).

Petitioners submit that the Sixth Circuit erred when it awarded Respondents $1 in nominal damages because there was no proof that Respondents sustained actual harm

and, thus, they failed to establish their claim of civil conspiracy to defraud. See, e.g., Tomsic v. Lautieri (In re Tri-Star Tech., Co., Inc.), 257 B.R. 629, 639 (Bankr. D. Mass. 2001) (holding trustee failed to demonstrate actual and, as such, there was no actionable civil conspiracy claim); Philbosian v. First Fin. Servs. Corp., 550 F. Supp. 61, 64 (D. Co. 1982) modified on other grounds, 1983 U.S. Dist. LEXIS 19390 (D. CO. Feb. 9, 1983) (stating that there is no action for civil conspiracy "unless and until actual damages are sustained and proven"); Tindall v. Holder, 892 S.W.2d 314, 321-22 (Mo. Ct. App. 1994) (reversing trial court's award of punitive damages because plaintiff failed to prove actual damages as a result of the alleged conspiracy to defraud).

Thus, although Respondents *claimed* that they suffered damages as a result of the alleged conspiracy, the Sixth Circuit found that Respondents failed to present any evidence of their alleged damages. (See App. 24). By awarding $1 in nominal damage, the Sixth Circuit effectively removed Respondents' burden of production on an essential element of their conspiracy to defraud claim – damage.

Indeed, the panel found that Plaintiffs' counsel "did not request damages for emotional injury or money expended to prosecute the action in closing argument." (App. 23). "Nor was the jury instructed on any particular element of damages resulting from the conspiracy to defraud claim." (App. 23). Thus, the Sixth Circuit held that "[e]ven taking the strongest legitimate view of the evidence in favor of the plaintiffs, the evidence was insufficient to support the *amount* of compensatory damages awarded for conspiracy to defraud." (App. 23-24).

"Nominal damages are not . . . proof of actual injury, nor given as the measure of pecuniary loss, but as a consequence of a technical injury without actual loss." Wadsworth v. Western Union Tele. Co., 8 S.W. 574, 584 (Tenn. 1888) (Lurton, J., *dissenting*). Although courts have allowed nominal damages in cases where the injured party

has suffered a constitutional or civil rights violation but no actual damages were suffered or proven, courts have refused to award nominal damages in fraud cases because actual damages "are an element of the cause of action." Tindall, 892 S.W.2d at 321-22.

The Sixth Circuit erred, therefore, when, after finding that Respondents had failed to prove actual damages, it nonetheless awarded Respondents $1 in nominal damages in order to support a $739,750 punitive damage award. Respondents' failure to prove that they suffered *actual* damages – which was an element of their claim – defeats their claim for conspiracy to defraud. Even if actual damages were hard to prove, as Respondents have alleged, because of the alleged conspiracy, that does not remove Respondents' burden. As the court in Tindall recognized, "the difficulty in proving an element of a cause of action does not dispense with the necessity of making proof." Id., 892 S.W.2d at 322.

When assessing the degree of reprehensibility of the Gusto Defendants' conduct, the Sixth Circuit stated that "[w]e are more than satisfied that the record demonstrates a high degree of reprehensibility on the part of each of the defendants." (App. 2). The Sixth's Circuit's finding of a "high degree of reprehensibility" is undermined, however, by their finding that Respondents failed to prove that they suffered any actual damages as a result of the alleged conspiracy.

C. Is A Gross Disparity Between The Actual Harm Suffered By Respondents And The Amount Of The Punitive Damage Award.

The second BMW factor requires an examination of the disparity between the actual harm or potential suffered by Respondents and the punitive damage award. As noted above, the Sixth Circuit found that Respondents failed to present sufficient evidence to support their compensatory damage award. (See App. 23-24). Thus, the Sixth Circuit

vacated the compensatory damage award and ordered the district court to enter a judgment for $1 in nominal damages on Respondents' conspiracy claim. (See App. 24).

The disparity between the harm suffered by Respondents as a result of the alleged conspiracy - $1 - and their punitive damage award - $739,750 - is "breathtaking." BMW, 517 U.S. at 583. The Sixth Circuit has given Respondents an award of punitive damages in the ratio of 739,750 to 1. This Court has held that punitive damages must bear a "reasonable relationship to the compensatory damages." BMW, 517 U.S. at 580. Because the punitive damage award issued in this case fails to bear a reasonable relationship to the nominal damage award and, in fact, is grossly excessive, it violates the Fourteenth Amendment and the judgment should have been vacated by the Sixth Circuit.[1]

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[1] The third BMW factor is the difference between the punitive damages and the civil penalties authorized or imposed in comparable cases. Because there are no civil penalties for fraud, this factor is inconclusive. Under Tennessee's Consumer Protection Act (the "Act"), however, a person found liable for willfully engaging in an unfair or deceptive act or practice can only be held liable for treble damages. See Tenn. Code Ann. § 47-18-109(a)(3). Thus, compared to the civil penalties authorized under the Act, the punitive damage award assessed against Petitioners is significantly greater.

CONCLUSION

For the foregoing reasons, the Petitioners respectfully request that this Court grant the Writ of Certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-5066/5067/5619

[ENTERED: October 1, 2001]

DONALD M. DAILY and HAROLD W. DAILY, JR., Individually and as Independent Co-Executors of the Estates of Mr. and Mrs. Harold W. "Pappy" Daily; and GLAD MUSIC COMPANY,

Plaintiffs-Appellees,

v.

GUSTO RECORDS, INC.; G.M.L., INC.; NASHVILLE QUALITY DUPLICATION, INC., also known as NQD, INC.; INTERNATIONAL MARKETING GROUP, INC., also known as IMG, Inc., (00-5067/5619); and HIGHLAND MUSIC, INC. (00-5066),

Defendants-Appellants,

GAYRON "MOE" LYTLE and STEPHEN HAWKINS,

Defendants.

ORDER

LEONARD GREEN, Clerk

Before: GUY, NORRIS and GILMAN, Circuit Judges

Defendants filed two petitions for rehearing and rehearing *en banc* of our decision filed on July 17, 2001. The petitions having been circulated not only to the original panel members but also to all other active judges of this

court, and no judge of this court having requested a vote on the suggestion for rehearing *en banc*, the petitions for rehearing have been referred to the original panel. The panel has further reviewed the petitions for rehearing and concludes that, with one exception, all the issues raised were fully considered in the original submission and decision.

Defendants argue that this court's decision to reduce the compensatory damage award to $1.00 makes the punitive damage awards so excessive as to violate their constitutional right to due process of law. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). When the constitutionality of a punitive damage award is challenged, the appellate court must review the award under a *de novo* standard. *See Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678, 1685-86 (2001).

The guideposts for making this determination are (1) the degree of reprehensibility of the wrongdoing, (2) the disparity between the harm or potential harm suffered by the plaintiff and the amount of the punitive damage award, and (3) the difference between the punitive damage award and other civil or criminal penalties imposed for comparable conduct. *BMW*, 517 U.S. at 575. Of these, the degree of reprehensibility is the most important indicium of the reasonableness of a punitive damage award. *Id.* In fact, "deceit" is among the "aggravating factors" identified in *BMW* as indicating a greater level of reprehensibility. *Id.* at 576. We are more than satisfied that the record demonstrates a high degree of reprehensibility on the part of each of the defendants.

The heart of defendants' constitutional challenge lies in the ratio between each of the punitive damage awards and the compensatory damage award, as reduced by this court, which range between 31,500:1 to as much as 250,000:1. The Court in *BMW* rejected the notion that "the constitutional line is marked by a simple mathematical formula, even one that compares actual and *potential* damage to the punitive award." *Id.* at 582 (emphasis in

original). Moreover, low compensatory damage awards may support higher ratios than large compensatory awards "if, for example, a particularly egregious act has resulted in only a small amount of economic damages." *Id.* "A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Id.*

Before this court reduced the amount of damages, the ratio to even the highest of the punitive damage awards was an unremarkable 1.5:1. The same punitive damage awards only result in suspiciously high ratios once the compensatory damage award is reduced to $1.00. Plaintiffs' evidentiary failure with respect to tort damages, however, does not prevent this court from considering the *potential harm* from defendants' conduct. The egregiousness of the defendants' conduct also justifies higher ratios. Further, we reject defendant's suggestion that punitive damages are constitutionally limited to a nominal amount whenever the plaintiffs are awarded only nominal damages. *See Timm v. Progressive Steel Treating, Inc.*, 137 F.3d 1008, 1010 (7th Cir. 1998) (punitive damages not inconsistent with lack of compensatory damages); *Edwards v. Jewish Hosp. of St. Louis*, 855 F.2d 1345, 1352 (8th Cir. 1988) (proportionality rule would invalidate most punitive damage awards in cases in which only nominal damages are awarded).

As for the last factor, Highland points to the civil penalties in the Tennessee Consumer Protection Act that allow civil penalties for unfair and deceptive trade practice of not more than $1,000 per violation. *See* TENN. CODE ANN. § 47-18-108(b)(3). It is not difficult to conceive that defendants' conduct, if compared on a per violation basis, would result in substantial civil penalties comparable to the punitive damages awarded here.

Our *de novo* review leads us to conclude that the punitive damage awards returned against each of the defendants were not so grossly excessive in relation to the

goals of punishment and deterrence as to violate due process. *BMW*, 517 U.S. at 568. The petitions for rehearing are denied.

ENTERED BY ORDER OF THE COURT
/s/Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-5066/00-5067/00-5619

[ENTERED: July 17, 2001]

DONALD M. DAILY and HAROLD W. DAILY, JR., Individually and as Independent Co-Executors of the Estates of Mr. and Mrs. Harold W. "Pappy" Daily; and GLAD MUSIC COMPANY,

Plaintiffs-Appellees,

v.

GUSTO RECORDS, INC.; G.M.L., INC.; NASHVILLE QUALITY DUPLICATION INC., also known as NQD, Inc.; INTERNATIONAL MARKETING GROUP, INC., also known as IMG, Inc., (00-5067/5619); and HIGHLAND MUSIC, INC. (00-5066),

Defendants-Appellants,

GAYRON "MOE" LYTLE and STEPHEN HAWKINS,

Defendants.

FILED: July 17, 2001

JUDGES:

Before: GUY, NORRIS, and GILMAN, Circuit Judges.

OPINION:

PER CURIAM. Defendants appeal from the judgment entered against them after a jury trial on claims of breach of contract, unjust enrichment, and conspiracy to defraud arising out of the plaintiffs' claims for producer's royalties on George Jones master recordings produced by Harold "Pappy" Daily. The jury found in favor of plaintiffs, Glad Music Company, the estates of Mr. and Mrs. Pappy Daily, and the two sons of Pappy Daily, and awarded damages (1) for breach of contract against Gusto Records, Inc., G.M.L., Inc. (GML), and Highland Music, Inc., in the amounts of $ 260,000, $ 108,000, and $ 24,000, respectively; (2) for unjust enrichment against Nashville Quality Duplication, Inc. (NQD) and International Marketing Group, Inc. (IMG) in the amount of $ 90,000 each; and (3) for conspiracy to defraud by all the defendants, jointly and severally, in the amount of $ 165,000. Then, after further testimony, the jury awarded punitive damages against the defendants as follows: Gusto Records, $ 250,000; GML, $ 250,000; NQD, $ 31,250; IMG, $ 208,500; and Highland, $ 44,500. Finally, the district court accepted the punitive damage awards, granted plaintiffs' request for pre- and post-judgment interest, and denied defendants' motions for judgment as a matter of law or new trial.[1]

Gusto and GML both argue that the verdicts against them for breach of contract were unsupportable by the record because there was no proof of any sales by them after 1986. In addition, NQD and IMG contend that they could not have been unjustly enriched because the jury found a valid contractual obligation existed between plaintiffs and the other defendants. Defendants also argue that there is no claim for conspiracy either because the obligations sound in contract, or because the evidence was insufficient to establish such a claim. Finally, defendants challenge the

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[1]The district court dismissed other claims before trial and denied plaintiffs' request for rescission. These claims are not at issue on appeal.

availability of punitive damages, the sufficiency of the evidence to support the damage awards, and the award of prejudgment interest. After careful review of the record and the arguments presented on appeal, we affirm except as to the unjust enrichment claims and the compensatory damage award on the conspiracy to defraud claim.

I.

Pappy Daily was nominated to the Country Music Hall of Fame for his work producing recordings by George Jones, which he did for many years. Under an agreement between Daily and Musicor Records effective January 1, 1968, Daily was to receive producer's royalties on the George Jones master recordings he produced for Musicor Records. A producer's royalty arises by contract and is meant to compensate the person who produces a master recording for the use of the master. Under the agreement, the producer's royalties would be equal to 25% of the amount of the artist's gross royalties. The artist's royalties, in turn, were calculated as a percentage of the retail sales of recordings made from the masters (*e.g.*, 8% of 90% of domestic retail sales). Daily produced recordings by George Jones for Musicor until 1971, when Jones signed with Epic Records.

At that time, Musicor granted RCA exclusive distribution rights to the George Jones master recordings. In a letter dated January 10, 1972, Musicor ratified its agreement to pay Daily producer's royalties on recordings made from the George Jones masters produced under the 1968 agreement and distributed by RCA. A handwritten notation on that document also indicated that royalties would be paid to Daily on "all Musicor product previously released." Relying on this notation, plaintiffs claimed that royalties were due for George Jones master recordings made both before and after 1968. Although the jury specifically found that Daily had produced George Jones master

recordings under which plaintiffs claimed producer's royalties, the jury was not asked to identify the recordings or the years those recordings were produced.

Gayron "Moe" Lytle, as the sole owner and president of GML, purchased some master recordings in 1977. While they were not Musicor masters, they included some to which Daily was entitled to publishing royalties. Publishing royalties, as distinguished from producer's royalties, arise by statute and compensate the owner of a musical composition for use of the copyrighted material at a set statutory rate. Lytle was also the sole owner and president of Gusto Records. GML licensed the master recordings to Gusto. Then Gusto, through an intermediary, negotiated an agreement with Daily to pay publishing royalties at half of the statutory rate. In 1982, Daily asked, through the same intermediary, that Lytle look into whether *producer's* royalties were also due on some master recordings Gusto was exploiting. Although assured that Lytle would look into it, nothing came of that inquiry.

GML did not acquire the George Jones master recordings that were made for Musicor until 1984. Springboard International had purchased Musicor and its master recordings, which it held until declaring bankruptcy in the early 1980s. The Springboard catalogue of recordings, including the George Jones Musicor masters, was acquired by Columbia Special Products, Inc. (CBS) and later sold first to JEY Production Company, then to Koala Records, and finally to GML. GML, which did not manufacture or distribute recordings, licensed the Springboard masters to Gusto and others.

In 1984, when Lytle renegotiated for Gusto to continue to pay Daily publishing royalties at half the statutory rate, Daily made no demand for payment of producer's royalties for the George Jones Musicor masters. There was no demand for producer's royalties at any time before Daily's death in 1987, or

before plaintiffs filed suit.[2] Although defendants argued that the failure to demand royalties waived the right to payment, the jury specifically found that plaintiffs had not waived their right to producer's royalties. Defendants do not challenge that finding on appeal.

When Gusto ceased manufacturing and distributing recordings in late 1986, GML granted Highland Music the exclusive right to license, lease, manufacture, or otherwise use the Springboard master recordings. Stephen Hawkins, who had prior business dealings with Lytle, started Highland Music in 1987 in order to do business under the lease with GML. Despite the exclusive grant of rights to Highland, Lytle and Hawkins informally agreed that GML could license the masters to other companies as well. Also, unlike standard industry contracts under which the owner indemnifies the licensee, the indemnity provisions under the agreement ran from Highland to GML.

The evidence established that the obligation to pay royalties, including producer's royalties, was transferred with the ownership of the master recordings. Although a licensee of an owner may agree to pay the royalties, a license agreement does not shield the owner from the obligation to pay royalties. A royalty is incurred when an entity manufactures and sells recordings made from the masters, or causes them to be manufactured and sold. Gusto, GML, and Highland concede on appeal that they assumed the obligation to pay producer's royalties to the extent that they were due.[3] The district court

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[2]Plaintiffs filed suit first in a Texas state court. That action was dismissed, however, for lack of personal jurisdiction over the defendants.

[3]The district court found the defendants were not barred from litigating the issue of whether the obligation to pay royalties followed the master recordings, even though they had stipulated to the issue in another case involving master recordings of other artists that were part of the Springboard catalogue. *See Thomas v. Gusto Records, Inc., 939 F.2d 395 (6th Cir. 1991).* Plaintiffs were not permitted to offer evidence concerning the decision in *Thomas* and, as a result, the district court refused to take judicial notice of the decision in reviewing the punitive damage award.

determined, on defendants' motion for summary judgment, that the statute of limitations barred any claims relating to royalty obligations that came due prior to December 9, 1988.

Plaintiffs maintained that Lytle and Hawkins set up and conducted their businesses in a manner that deliberately made it difficult or impossible for artists and producers to establish what royalties were due them. Lytle was the sole owner and president of GML, Gusto, NQD, and IMG. As such, Lytle controlled (1) GML and Gusto, which each owned the master recordings during the limitations period; (2) NQD, which manufactured cassette tapes from the masters; and (3) IMG, which distributed both cassettes and CDs made from the masters. Plaintiffs argued that Lytle simply divided the functions of a recording company between his entities and inserted Highland between them as a "straw man" to avoid paying royalties. In addition, defendants failed to keep records that identified sales and income by reference to artist or recording, making it impossible to prove a claim for artist's or producer's royalties. There was evidence that the industry practice is to document both the manufacture and distribution of recordings, as well as any third party licensing of the masters, and to rely on the owners to keep complete and accurate records to determine the amount of royalties owed.

Lytle operated GML, Gusto, NQD, and IMG from the same address and each did business with Highland. Highland paid NQD to manufacture cassettes from the masters. NQD transferred the tapes across the warehouse to IMG, which paid Highland one or two dollars per tape. IMG distributed the recordings for three to five dollars each. IMG also sold the recordings at higher prices through its mail order catalogue, which it operated under the unregistered assumed name of Cindy Lou Records. Highland paid 5% of the wholesale price it received from IMG back to GML, but

paid other licensors on a "per-track" basis rather than as a percentage of sales. Although Highland had other customers, about 75% of its sales were to IMG.[4]

Highland admitted to having exploited George Jones master recordings, but contested the amount of producer's royalties that were due as a result. Hawkins prepared a schedule of estimated royalties based upon his review of Highland's records. Plaintiffs argued that the estimates failed to account for the entire period, under-reported sales, overstated credits, and incorrectly calculated the royalties from wholesale rather than retail prices. There were also unexplained credits and accounting transfers between the companies, including a credit memo from Highland to IMG for $ 363,000. For the period from 1990 to 1998, Hawkins estimated that plaintiffs were owed only $ 14,020.87 in producer's royalties on master recordings made between 1968 and 1972, or as much as $ 64,247.72 if Musicor masters recorded before 1968 were also included.

Lytle testified that he believed he had made a profit from the exploitation of the George Jones Musicor masters, but kept no records from which he could make that determination. Lytle admitted that IMG distributed cassettes and CDs made from the Musicor masters owned by GML and Gusto. Lytle did not have IMG keep records, as was customary in the industry, that would identify recordings by number, catalogue, quantity, or cost. Plaintiffs were unable to offer proof from defendants' records that either GML or Gusto sold recordings made from the Musicor masters within the limitations period. Plaintiffs nonetheless maintained that GML and Gusto, as owners, had caused the manufacture and sale of such recordings and were obligated to pay producer's royalties for such sales.

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[4]There is no dispute that the activities of NQD, as a manufacturer of tapes, and IMG, as a distributor of CDs, cassettes and other products, did not give rise to a contractual obligation to pay royalties. This is consistent with the jury's finding that only GML, Gusto, and Highland were liable for breach of contract.

Plaintiffs also claimed that defendants transferred ownership of the masters to make it more difficult for artists and producers to prove a claim for royalties. In 1994, after plaintiffs had filed suit. GML transferred the Springboard catalogue to Gusto without any written agreement to document the transfer. Lytle testified that GML made the transfer through an accounting entry to pay a debt owed to Gusto. Highland continued to manufacture and sell recordings made from the Springboard masters after that date.

Then in December 1997, Gusto sold the Springboard master recordings to Catalogue Music, Ltd., an English company. The purchase price of $ 3.5 million was paid with a promissory note and a deposit of $ 150,000. Hawkins, as owner and president of Catalogue Music, was the purchaser. When deposed later that same month, however, Lytle testified that the master recordings were still owned by Gusto and that there was no agreement with Hawkins to change ownership of the masters. Plaintiffs did not learn of the transfer until June 1999, about a month before trial. After trial, the district court found that defendants' failure to disclose the sale to plaintiffs was sanctionable.[5]

Plaintiffs filed this action in December 1994 and amended their complaint twice. After defendants' motions to dismiss and for summary judgment narrowed the claims, trial commenced in July 1999. As set forth above, the jury found that Gusto, GML, and Highland had breached their contractual obligation to pay the royalties; that NQD and

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[5]At the time of the transfer in December 1997, Lytle's companies were being sued in another federal action for royalties on other master recordings that were part of the Springboard catalogue. A motion for temporary restraining order seeking to prohibit the anticipated transfer of the master recordings was filed. The district court found there was a strong probability that the impending transfer to Catalogue Music was fraudulent. After oral argument but before entry of the temporary restraining order, Gusto transferred the masters to Catalogue Music. The sales agreement was later amended to make its effective date January 1, 1998. The same counsel represented the Gusto defendants in this case.

IMG were unjustly enriched; and that all of the defendants participated in the conspiracy to defraud plaintiffs. A total of $ 737,000 in compensatory damages and $ 784,250 in punitive damages were awarded against the various defendants. The punitive damage awards were reviewed and accepted by the district court, as is required by Tennessee law, and judgment was entered accordingly. On March 31, 2000, the district court denied defendants' post-trial motions and awarded plaintiffs both pre- and post-judgment interest on the compensatory damage awards. Defendants appealed.

II.

A. Motion for Judgment as a Matter of Law

The district court's decision to deny the defendants' motions for judgment as a matter of law is reviewed *de novo. K&T Enters., Inc. v. Zurich Ins. Co., 97 F.3d 171, 175 (6th Cir. 1996).* In a diversity action, the district court must apply the state law standard in reviewing a Rule 50(b) motion that challenges the sufficiency of the evidence. *Id. at 176.* At the same time, "we need show no deference to the *trial court's* assessment of the sufficiency of the evidence before a jury, even if state law so requires." *Id.* The court's legal determinations are reviewed *de novo. See Orchard Group, Inc. v. Konica Med. Corp., 135 F.3d 421, 425 (6th Cir. 1998).*

Under Tennessee law, a motion for judgment notwithstanding the verdict challenging the sufficiency of the evidence requires a determination of whether there is any material evidence to support the verdict. *See Holmes v. Wilson, 551 S.W.2d 682 (Tenn. 1977).* Courts must "take the strongest legitimate view of the evidence in favor of the opponent of the motion, allow all reasonable inferences in his or her favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence." *Id. at*

685. A directed verdict is only appropriate when the evidence is susceptible to but one conclusion. *Eaton v. McLain, 891 S.W.2d 587, 590 (Tenn. 1994).*

1. Breach of Contract

The jury found breach of contract by GML, Gusto, and Highland and awarded damages against them in the amount of $ 260,000, $ 108,000 and $ 24,000, respectively. Defendants do not challenge the jury's finding that Daily produced George Jones master recordings for which plaintiffs claimed producer's royalties. Rather, GML and Gusto argue that there was no evidence that either of them sold recordings made from the masters within the limitations period. While plaintiffs admit to having no proof that GML or Gusto sold or licensed the right to sell recordings, apart from those accounted for by Highland, plaintiffs did not concede that Highland's estimates represented the entire universe of sales for which producer's royalties were due. GML and Gusto argue that reversal is required because the jury was permitted to speculate about both the fact and the amount of such sales.

The district court rejected defendants' challenge to the sufficiency of the evidence, explaining that:

> The evidence adduced at trial showed that the record-keeping and accounting practices of the Gusto Defendants, under the control and ownership of Gayron "Moe" Lytle, were obtuse, non-specific, and highly unusual. In fact, they were so byzantine as to make it impossible for anyone, including Lytle, to determine what royalties were due to the artists and producers whose masters he was exploiting. There was no paperwork documenting the transfers of various masters between entities controlled by Lytle and none documenting the flow of the revenue stream

> created through the exploitation of the masters. There was a strong suggestion that Defendants' record-keeping methods were intentionally utilized to mask the true volume of sales from particular products, to thwart discovery of this information, and to avoid liability. In short, evidence of Gusto's and GML's long-term and continuous failure to keep any sort of decipherable record of any liabilities owed to artists and producers was substantial, and not in accord with the general practice within the industry. From all the evidence, a reasonable jury could infer that Gusto and GML sold cassettes. CDs, and/or records made from Plaintiffs' masters after December 9, 1988, such that the companies incurred an obligation to pay producer's royalties.

"Uncertain and speculative damages are prohibited only when the *existence* of damage, is uncertain, not when the *amount* is uncertain. " *Cummins v. Brodie, 667 S.W.2d 759, 765 (Tenn. Ct. App. 1983)* (emphasis added). All that is required is proof of damages within a reasonable degree of certainty. *See W. Sizzlin, Inc. v. Harris, 741 S.W.2d 334, 336 (Tenn. Ct. App. 1987).* The law does not require exactness in the computation of damages. *See Sholodge Franchise Sys., Inc. v. McKibbon Bros., 919 S.W.2d 36, 42 (Tenn. Ct. App. 1995).* In fact, "courts will allow recovery even if it is impossible to prove the exact amount of damages from the breach of contract. Otherwise, in certain instances, the courts would be powerless to help some wronged parties." *Cummins, 667 S.W.2d at 765.*

Our *de novo* review leads us to conclude that there was material evidence from which a jury could reasonably conclude, even without proof of specific sales by GML or Gusto, that those entities caused the manufacture and sale of

recordings for which there was an obligation to pay producer's royalties. Although only a few of IMG's catalogs were offered into evidence, they showed that the masters had been exploited and recordings offered for sale. Highland's admitted sales of cassettes and CDs made from the masters, along with the jury's prerogative to conclude that the estimates were not complete and accurate, provided sufficient evidence of the *existence* of damages beyond those admitted by Highland.

There was also evidence that plaintiffs' inability to demonstrate the amount of royalties earned resulted from Lytle's own obfuscatory record-keeping practices. Even Lytle testified that he did not keep records from which he could determine whether he made a profit on recordings made from any particular master and did not keep records from which artist's or producer's royalties could be calculated. Taking the strongest legitimate view of the evidence and all reasonable inferences in favor of plaintiffs, there was sufficient evidence to support the verdicts against GML and Gusto for breach of contract.

2. Unjust Enrichment

NQD and IMG argue that they are entitled to judgment as a matter of law on plaintiffs' claims for unjust enrichment because the jury found a valid contract for producer's royalties and awarded damages for breach of that contract. The district court disagreed, explaining that although NQD and IMG did not assume any contractual obligation to pay royalties, they nonetheless profited financially from exploitation of the master recordings produced by Daily. Whether recovery under the quasi-contractual theory of unjust enrichment is barred in this case is a legal determination, which we review *de novo*.

The Tennessee Supreme Court has explained that unjust enrichment, quasi contract, *quantum meruit*, and contracts implied at law all describe "that class of implied

obligations where, on the basis of justice and equity, the law will impose a contractual relationship between parties, regardless of their assent thereto." *Paschall's, Inc. v. Dozier, 219 Tenn. 45, 407 S.W.2d 150, 154 (Tenn. 1966).* The essential elements are: (1) a benefit conferred upon the defendant by the plaintiff; (2) appreciation by the defendant of such benefit; and (3) circumstances under which the acceptance of the benefit without payment would be inequitable. *See 407 S.W.2d at 155.* "The most significant requirement for a recovery on quasi contract is that the enrichment to the defendant be unjust." *Id.*

As a general rule, a contract cannot be implied at law when a valid contract exists on the same subject matter. *See Jaffe v. Bolton, 817 S.W.2d 19, 26 (Tenn. Ct. App. 1991); Fletcher Realty, Inc. v. Hayslope Props., 712 S.W.2d 478, 481 (Tenn. Ct. App. 1986).* In *Paschall's,* the court held that when one furnishes labor and materials under an express contract and the contract becomes invalid or unenforceable, he may seek recovery against the third party who benefitted under a quasi contract theory. Even so, the court also observed that "where one is afforded recovery from the person with whom he has a contract, he cannot also recover from third persons incidentally benefitted by his performance." *Paschall's, 407 S.W.2d at 154.*

Plaintiffs argue that the jury was free to impose an implied contract for producer's royalties against NQD and IMG because they were making profits as part of Lytle's *de facto* record company without incurring the expense of paying the producer's royalties. Yet, plaintiffs have conceded that neither NQD nor IMG had an obligation to pay producer's royalties. While there was evidence that NQD and IMG made profits by operating as separate entities from GML or Gusto, it was not inequitable or unjust for them to make a profit. Rather, plaintiffs were entitled, under either express or implied contract, to receive only producer's royalties equal to a percentage of the retail sales.

Since the jury found a valid contract for producer's royalties and held GML, Gusto, and Highland liable for the royalties incurred through the exploitation of the master recordings, including presumably those recordings manufactured by NQD and sold by IMG, plaintiffs could not also recover royalties from NQD and IMG under a theory of implied contract. Accordingly, we find NQD and IMG were entitled to judgment as a matter of law, and we reverse the verdicts against them for unjust enrichment.

3. Conspiracy to Defraud

Civil conspiracy has been defined as "a combination between two or more persons to accomplish by concert an unlawful purpose, or to accomplish a purpose not in itself unlawful by unlawful means." *Dale v. Thomas H. Temple Co., 186 Tenn. 69, 208 S.W.2d 344, 353 (Tenn. 1948).* The Court in *Dale* specifically recognized a cause of action for conspiracy to defraud, explaining that:

> A 'conspiracy to defraud' on the part of two or more persons means a common purpose, supported by a concerted action to defraud, that each has the intent to do it, and that it is common to each of them, and that each has the understanding that the other has that purpose. The agreement need not be formal, the understanding may be a tacit one, and it is not essential that each conspirator have knowledge of the details of the conspiracy.

208 S.W.2d at 353-54 (citations omitted). Defendants argue that they are entitled to judgment as a matter of law on the conspiracy claim and reversal of both the compensatory and punitive damage awards because (1) the conspiracy claim is not actionable; (2) the evidence was not sufficient to support a finding of conspiracy to defraud; and (3) there was

insufficient evidence of either a compensable injury or the kind of conduct required to support a punitive damage award.

a. Conspiracy to Defraud or to Breach a Contract

Defendants argue that plaintiffs' conspiracy to defraud claim was nothing more than a claim for conspiracy to breach a contract. Although Tennessee has not specifically rejected a cause of action for conspiracy to breach a contract, it does not recognize a cause of action for negligent or tortious breach of contract apart from a breach of contract claim. *See Mid-South Milling Co. v. Loret Farms, Inc., 521 S.W.2d 586, 588 (Tenn. 1975).* The district court denied defendants' motion for judgment as a matter of law on the grounds that the plaintiffs pleaded and proved a claim for conspiracy to defraud, which is recognized in Tennessee, and not a conspiracy to breach a contract or induce a breach of contract. We review this legal determination *de novo,* while adhering to the jury's factual findings.[6]

Defendants rely principally upon two New York cases that held allegations of fraud in connection with the failure to pay royalties were insufficient to state a claim distinct from a claim for breach of contract. In *Miller v. Columbia Records, 70 A.D.2d 517, 415 N.Y.S.2d 869, 871 (N.Y. App. Div. 1979),* the court affirmed the dismissal of an action

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[6]Highland contends that we may disregard the plaintiffs' characterization of a claim as a tort when the injury is the deprivation of a contractual right. *See Alexander v. Third Nat'l Bank, 915 S.W.2d 797 (Tenn. 1996); Pera v. The Kroger Co., 674 S.W.2d 715, 720 (Tenn. 1984).* In both *Alexander and Pera,* however, the Court was confronted with the question of which statute of limitations applied, not whether a separate tort claim could be alleged. The Court explained that: "'It is well settled in [Tennessee] that the gravamen of an action, rather than its designation as an action for tort or contract, determines the applicable statute of limitations.'" *Alexander, 915 S.W.2d at 798* (quoting *Pera, 674 S.W.2d at 719).*

to recover royalties and in doing so concluded, without any discussion, that the complaint "tried but failed to allege a cause of action for an independent fraud as distinct from breach of contract."

In *Rodgers v. Roulette Records, Inc., 677 F. Supp. 731, 738 (S.D.N.Y. 1988),* the district court granted summary judgment to the defendants after finding that not only were the fraud claims time barred, but also that the plaintiff had failed to state a claim. The plaintiff alleged that the false royalty statements constituted fraudulent misrepresentation and breach of contract. However, falsely representing that one is abiding by a contract is not sufficient to state a claim for fraud separate from the breach of contract under New York law. Thus, the court found that the "fraud claim fails for the simple reason that the fraud they allege is nothing more than the breach of contract." *Id.*

Reliance on these cases alone, however, begs the critical question of whether plaintiffs' conspiracy claim alleged nothing more than conspiracy to breach a contract. Another New York decision confirms that one does not have a cause of action against another contracting party for conspiracy to breach the agreement between them. *See North Shore Bottling Co. v. C. Schmidt & Sons, Inc., 22 N.Y.2d 171, 239 N.E.2d 189, 292 N.Y.S.2d 86 (N.Y. 1968).* "But it is equally plain that a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to, the breach of contract." *239 N.E.2d at 193.*

In this case, plaintiffs maintained that the defendants joined in a common plan to fraudulently conceal the exploitation of the master recordings by maintaining records "in such a way that the information needed to determine royalty obligations was either missing or was so obfuscated that no royalties could ever be accurately calculated." Plaintiffs also alleged that the defendants conspired to defraud by "masking" ownership of the masters to make the pursuit of a claim more difficult. While both the breach of

contract and conspiracy to defraud claims arose out of the contractual obligation to pay royalties, the objects of the alleged conspiracy to defraud were distinct from the breach of the contractual obligation to pay producer's royalties. In addition, concealment of a material fact may constitute fraud when, among other things, it appears that one party to the contract reposed a trust and confidence in the other. *See Justice v. Anderson County, 955 S.W.2d 613, 616-17 (Tenn. Ct. App. 1997)* (quoting *In Domestic Sewing Mach. Co. v. Jackson, 83 Tenn. 418 (1885)).* We find that plaintiffs' claim for conspiracy to defraud did not simply restate a breach of contract claim.

b. Sufficiency of Evidence

Defendants argue that they are entitled to judgment as a matter of law because there was no evidence to support the finding that they participated in a conspiracy to defraud plaintiffs either through their record-keeping practices, or by "masking" ownership of the master recordings. Taking the evidence and all reasonable inferences in favor of the plaintiffs, we find that there was material evidence, both direct and circumstantial, from which the jury could have concluded that each of the defendants participated in the conspiracy to defraud the plaintiffs.

Defendants maintain that they were ignorant of plaintiffs' claim to producer's royalties, so could not have intended to defraud them through the alleged conspiracy. Highland argues specifically that it did not "hide" its activities from plaintiffs since it negotiated and paid publishing royalties to plaintiffs from which plaintiffs could have determined that it was exploiting some of the master recordings at issue. While this was admittedly true, the jury was nonetheless entitled to disbelieve the claims of

ignorance by Lytle and Hawkins.[7] Finally, Highland contends that there was no evidence it participated in the conspiracy by failing to keep adequate records since plaintiffs' expert was not permitted to give his opinion concerning Highland's record-keeping practices. On the contrary, Hawkins himself testified and was cross-examined concerning the records kept by Highland and his own estimate of the royalties due based upon those records.

We find that there was evidence from which the jury could conclude that GML, Gusto, Highland, NQD, and IMG reached a tacit understanding that the records created through their business with each other would not set forth the information necessary to calculate the royalties due to artists and producers. That understanding may be inferred from the interrelationship between the companies; Lytle's failure to keep any records from which royalty payments could be calculated; the departures from industry standards in the dealings between GML, Gusto, and Highland; and the secret transfer of the master recordings to a company owned by Hawkins.

c. Compensatory and Punitive Damages

The jury found that the defendants were each involved in the conspiracy to defraud plaintiffs and awarded $ 165,000 in compensatory damages against the defendants, jointly and severally. In denying the defendants'

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[7]Notably, when Hawkins flatly denied ever participating with Lytle in efforts to avoid other royalty obligations, the district court allowed him to be impeached with the fact that Hawkins and Highland had been found in contempt of court for violating an express term of a prior judgment prohibiting the exploitation of certain master recordings. *See Peterson v. Highland Music, Inc., 140 F.3d 1313, 1317 (9th Cir. 1998).* The jury was instructed that this evidence was admitted for the limited purposes of challenging Hawkins' credibility; showing Hawkins' knowledge of Highland's relationship to and dealings with Gusto and GML; and demonstrating motive or opportunity.

motion for judgment as a matter of law, the district court found that there was evidence that plaintiffs sustained injuries in addition to their contract damages as a result of the conspiracy. The court indicated further that those injuries "include emotional pain and suffering, as well as expenses incurred in attempting to determine what royalties were owed and in attempting to collect them. These expenses alone totaled over $ 345,000."

Defendants challenge the sufficiency of the evidence to support the award, arguing that emotional injuries are not compensable absent expert testimony. This argument seriously misapprehends the decision in *Camper v. Minor, 915 S.W.2d 437 (Tenn. 1996)*, which held that expert testimony is required to establish a *prima facie* case of *negligent* infliction of emotional distress. *Compare Miller v. Willbanks, 8 S.W.3d 607 (Tenn. 1999).* As plaintiffs observe, damages for mental suffering are recoverable in an action for civil conspiracy. *See Braswell v. Carothers, 863 S.W.2d 722, 727 (Tenn. Ct. App. 1993)* (citing *Lackey v. Metro. Life Ins. Co., 30 Tenn. App. 390, 206 S.W.2d 806 (Tenn. Ct. App. 1947)).* There must, however, be evidence of mental suffering to support the jury's award.

Defendants also argue that evidence of legal fees and expenses incurred in this litigation cannot support the award. First, legal fees and expenses are not recoverable absent a contractual or statutory obligation. *See John Kohl & Co. v. Dearborn & Ewing, 977 S.W.2d 528, 534-35 (Tenn. 1998).* Second, as defendants correctly observe, the evidence concerning the amount of fees and expenses incurred was only presented during the punitive damages phase and was not before the jury when it awarded compensatory damages on the conspiracy claim.

The record shows that plaintiffs' counsel did not request damages for emotional injury or money expended to prosecute the action in closing argument. Nor was the jury instructed on any particular element of damages resulting from the conspiracy to defraud claim. Even taking the

strongest legitimate view of the evidence in favor of the plaintiffs, the evidence was insufficient to support the *amount* of compensatory damages awarded for conspiracy to defraud. The fact of injury, however, is supported by the record. Therefore, plaintiffs are entitled to an award of nominal damages and the district court is directed to enter judgment in favor of plaintiffs in the amount of $ 1.00 against the defendants, jointly and severally, for conspiracy to defraud.

With respect to punitive damages, the jury specifically found by clear and convincing evidence that the defendants acted intentionally, recklessly, maliciously, or fraudulently in conspiring to defraud plaintiffs. The district court's judgment set forth its findings and conclusions with regard to its decision to accept the jury's punitive damage award. *See Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 902 (Tenn. 1992)* (trial judge shall review and accept or reject award of punitive damages). Our decision on the compensatory damage award does not undermine the punitive damage awards, which are supported by more than sufficient evidence. *See Oakley v. Simmons, 799 S.W.2d 669 (Tenn. Ct. App. 1990).*

On appeal, Highland argues that there was insufficient evidence to support an award of punitive damages. The district court rejected this contention, finding that

> when viewed in toto, the record shows clear and convincing evidence that this conduct was intentional, reckless, malicious, and/or fraudulent such that punitive damages are justified. The intentional nature of this conduct can easily be inferred from the following facts. Defendants knew they were in sole control of the information regarding the transfers of titles and ownership of the masters and of the sales records and licensing agreements. They knew they were not making any producer's royalty payments on the masters at issue, and they

> tried to avoid payment by masking the trail of title ownership and responsibility for payment. When questioned about their liability for payment, Defendants initially denied they owed Plaintiffs any royalties and assumed the defensive position of demanding Plaintiffs produce the documents and records to prove their claim. Defendants were aware that their records and record-keeping methods prevented any clear resolution of this problem. At trial, one of the Defendants candidly admitted that producer's royalties were owed to Plaintiffs on some of the masters, but it could not determine how much and on which masters.

We agree with the district court that the evidence was sufficient to support the finding, by clear and convincing evidence, that the defendants each acted intentionally, recklessly, maliciously, or fraudulently in conspiring to defraud the plaintiffs. Defendants do not otherwise challenge the district court's acceptance of the punitive damages awards, or its findings on the specific factors considered by the jury in determining the proper amount to be awarded.[8]

---

[8]The factors considered included: (1) defendants' financial affairs, condition, and net worth; (2) the nature and reprehensibility of the wrongdoing, which was defined as the impact on the relationship between plaintiffs and defendants; (3) defendants' awareness of the amount of harm caused and its motivation in causing it; (4) the duration of the misconduct and whether defendants tried to conceal it; (5) the expense plaintiffs bore in attempting to recover their losses; (6) whether defendants profited from the activity and, if so, whether the punitive damages should exceed defendants' profits in order to deter similar behavior; (7) whether and the extent to which defendants have been subject to previous punitive damage awards for the same wrongful act; (8) whether defendants took remedial action or attempted to make amends by offering prompt and fair settlement for actual harm once the wrong was known to them; and (9) any other circumstances that bear on determining the proper amount of punitive damages.

B. Prejudgment interest

Finally, defendants contend that the district court abused its discretion by awarding prejudgment interest on the compensatory damage awards for breach of contract, unjust enrichment, and conspiracy because the amount of defendants' obligations were neither certain nor reasonably ascertainable. We disagree.

There is no dispute that in a diversity action the question of prejudgment interest must be determined under state law. *See Mass. Benefit Ass'n v. Miles, 137 U.S. 689, 34 L. Ed. 834, 11 S. Ct. 234 (1891).* Under Tennessee law, the award of prejudgment interest, as an element of, or in the nature of damages, is permitted in accordance with the principles of equity at a rate not to exceed 10% per annum. *See* TENN. CODE ANN. § 47-14-123 (1995). An award of prejudgment interest will not be disturbed unless the record reveals a manifest and palpable abuse of discretion. *See Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 446 (Tenn. 1992).*

The principles guiding the exercise of discretion to award prejudgment interest were clarified by the Tennessee Supreme Court in *Myint v. Allstate Insurance Co., 970 S.W.2d 920 (Tenn. 1998).* Identifying the principles of equity as being "foremost," the Court explained:

> Simply stated, the court must decide whether the award of prejudgment interest is fair, given the particular circumstances of the case. In reaching an equitable decision, a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled, not to penalize a defendant for wrongdoing.

Id. at 927. The Court observed that two additional criteria have emerged from the case law; one of which being that prejudgment interest is allowed when the amount of

the obligation is certain (or can be ascertained) and is not disputed on reasonable grounds. *See Mitchell v. Mitchell, 876 S.W.2d 830, 832 (Tenn. 1994).* The Court noted, however, that only a liquidated claim can truly be considered an obligation of certain and indisputable amount. Consequently, the Court clarified that

> if the existence or amount of an obligation is certain, this fact will help support an award of prejudgment interest as a matter of equity. . . . The converse, however, is not necessarily true. The uncertainty of either the existence or amount of an obligation does not *mandate* a denial of prejudgment interest, and a trial court's grant of such interest is not automatically an abuse of discretion, provided the decision was otherwise equitable. The certainty of the plaintiff's claim is but one of many nondispositive facts to consider when deciding whether prejudgment interest is, as a matter of law, equitable under the circumstances.

Myint, 970 S.W.2d at 928.

In this case, the district court focused upon the proper considerations in finding that the ends of justice and equity were best served by awarding prejudgment interest on the compensatory damages. The district court also concluded that the defendants' obfuscatory record-keeping practices were the cause of the uncertainty concerning the amount of damages and, as a result, plaintiffs should not be penalized for the fact that the damages could not be proven with certainty. We find no abuse of discretion in this regard.

For the reasons set forth in this opinion, the district court's denial of judgment as a matter of law to the defendants on the breach of contract claims, the conspiracy

claim, and the award of punitive damages is **AFFIRMED**. The denial of judgment as a matter of law is **REVERSED** on the unjust enrichment claims against NQD and IMG and with respect to the compensatory damages awarded for conspiracy to defraud. The award of prejudgment interest is **AFFIRMED** with respect to the breach of contract claims and **VACATED** with respect to the unjust enrichment claims. The matter is **REMANDED** for entry of judgment consistent with this opinion, including the award of $ 1.00 in nominal damages for conspiracy to defraud against the defendants, jointly and severally, along with the appropriate amount of prejudgment interest on that award.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

No. 3:94-1090

[ENTERED: December 14, 1999]

DONALD M. DAILY, et al.,	)
	)
Plaintiffs,	)
	)
v.	)
GUSTO RECORDS, INC., et al.,	)
Defendants.	)

JUDGE ECHOLS

JUDGMENT

This case was tried before a jury which found in favor of Plaintiffs, awarding compensatory damages in the amount of $737,000 and punitive damages in an amount totaling $784,250. Under Tennessee law, after a jury has made an award of punitive damages, the trial judge shall review the award, giving consideration to all matters on which the jury was instructed. Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 902 (Tenn. 1992). In accepting or rejecting the award, the judge shall set forth findings of facts and conclusions of law with regard to his reasons for accepting or rejecting the jury's award. Id.

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By: JCH

In this case, the jury was instructed to consider: (1) Defendants' financial affairs, financial condition and net worth; (2) the nature and reprehensibility of Defendants' wrongdoing, which the Court defined as the impact of Defendants' conduct on Plaintiffs conduct on Plaintiffs and the relationship of Defendants to Plaintiffs; (3) Defendants' awareness of the amount of harm being caused and its motivation in causing it; (4) the duration of Defendants' misconduct and whether Defendants attempted to conceal the conduct; (5) the expense Plaintiffs bore in attempting to recover their losses; (6) whether Defendants profited from the activity and, if so, whether the punitive damages award should be in excess of the profit in order to deter similar future behavior; (7) whether, and the extent to which, Defendants have been subjected to previous punitive damages awards based upon the same wrongful act; (8) whether, once the misconduct became known to Defendants, Defendants took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and (9) any other circumstances shown by the evidence that bear on determining the proper amount of the punitive damages award.

In accordance with the foregoing, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Four of the Defendant companies - - Gusto Records, Inc. ("Gusto"), GML, Inc. ("GML"), Nashville Quality Duplicating, Inc. ("NQD"), and International Marketing Group, Inc. ("IMG") - - are owned by Gayron ("Moe") Lytle.

2. Stephen Hawkins is the owner and president of the fifth Defendant company, Highland Music, Inc. ("Highland").

3. Gusto is a record company that owns and licenses master recordings.

4. GML owns real estate.

5. NQD is a custom tape manufacturing company.

6. IMG buys and sells various commodities, including CDs and cassettes. It purchases some of its music-related products from Highland.

7. Highland is a record company that operates as a licensee of Gusto and/or GML, although it also does business with other companies in the music industry. Highland licenses music to third parties and sells and/or licenses many of Gusto's products in Europe. It has been doing business with Gusto since 1987.

8. Plaintiffs Donald M. Daily and Harold W. Daily, Jr., are the sons of country music producer Harold W. "Pappy" Daily, and they pursued at trial claims against Gusto, GML, NQD, IMG and Highland (collectively, "Defendants") for breach of contract, unjust enrichment and conspiracy to commit common law fraud.

9. Plaintiffs sought to recover producer's royalties generated by retail sales of cassettes and compact discs of certain songs recorded by George Jones. The songs were performed and recorded between January 1, 1968, and January 10, 1972, and the cassettes and compact discs were produced by use of master recordings (the "masters") of these songs.

10. . The proof indicates that there was an initial agreement for the payment of producer's royalties to Pappy Daily, father of the Plaintiffs, on the George Jones masters. Further, it is typical within the music industry that the royalty obligations, pursuant to the original agreement, are assumed by the person or entity acquiring such master recordings. The George Jones masters were acquired by Gusto.

Pappy Daily was entitled to receive producer's royalty payments for recordings produced from the George Jones masters because he either produced the masters or was party to agreements entitling him to a producer's royalty. The royalty payments generated by the George Jones masters were to be made by the owner of the masters. During the proof of the case, Mr. Stephen Hawkins, owner of Highland, which has a long-standing interwoven business relationship with the other Defendants, admitted that Highland exploited the masters under its license agreement with Gusto and Plaintiffs were due producer's royalty payments. He simply disagreed with the amount of producer's royalties claimed by the Plaintiffs.

11. From December 9, 1988 (the earliest date for which damages are recoverable pursuant to the statute of limitations), and until June 1998 (the month the masters were sold to Catalogue Music, Ltd.), Gusto and GML owned certain George Jones master recordings which Pappy Daily produced. During at least part of this time, Highland licensed the masters from Gusto and GML and utilized the masters in producing or allowing others to exploit the masters.

12. Defendants have benefited from exploitation of the George Jones masters by conspiring together to mask the lawful title and ownership of the master recordings through a complex web of business relationships and accounting methods as well as through re-mixing the master

recordings.[9] The Court did not allow Plaintiffs' counsel to question Hawkins about the details of this trial or the sanctions imposed by the court. However, the Court did instruct the jury that in the Peterson case the court "did make a finding that Highland Music and Hawkins [individually] deliberately aided and abetted Gusto Records and GML in violating the express terms of a prior court judgment related to that lawsuit. And they were found in contempt of court for doing so." The Court further instructed the jury that this evidence was admitted only for the limited purposes of (1) challenging Hawkins' credibility, (2) showing the knowledge of Hawkins and Highland as to their relationship and dealings with Gusto and GML, and/or (3) showing motive or opportunity. Tr. at 514-16.

13. Defendants engaged in a series of transactions involving transfers of the title and ownership of the masters, which tended to impede Plaintiffs' discovery of the amount of producer's royalties to which they were entitled. The proof indicates that said Defendants profited from revenue earned in their inter-company dealings, as well as from sales of cassette tapes and merchandise to the public.

In addition, the Defendant companies failed to maintain the kind of information and financial records concerning their business operations and exploitation of the

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[9]When asked whether he had "ever participated with Mr. Lytle to avoid any of his obligations" to pay royalties in connection with business transactions such as the ones at issue, Mr. Hawkins replied, "Absolutely not." Tr. at 500. After eliciting this response, Plaintiffs' counsel sought to impeach the witness by questioning him about contempt sanctions previously imposed by a California district court against Hawkins, Highland, Gusto, and GML because the Defendants had violated a Court injunction prohibiting the unlawful exploitation of certain master recordings which Defendants had gained possession but on which they had not paid any royalties. See Peterson v. Highland Music, Inc., 140 F.3d 1313, 1317 (9th Cir. 1998) (affirming district court), cert. denied, __ U.S. __, 119 S. Ct. 446, 142 L.Ed.2d 401 (1998).

masters from which Plaintiffs or others could determine the volume of licenses and/or sales, the sales price of products, the profits derived, and the amounts of producer's royalties owed. The proof indicates that it is industry practice to document the manufacture and distribution of master recordings and any third party licensing of such recordings, and the industry relies on complete and accurate records of the owners of the masters to determine the amount of royalties owed. Defendants' conduct in failing to create and maintain such documentation is contrary to industry practice. Through said conduct, Defendants made it extremely difficult for Plaintiffs or others to track the masters and their exploitation.

14. The jury found this conduct constitutes a civil conspiracy against the Plaintiffs and fixed compensatory damages at $165,000.

15. The jury also found that Gusto, GML, and Highland breached their contractual obligations to Plaintiffs and fixed damages for breach of contract as follows: $260,000 against Gusto; $108,000 against GML; and $24,000 against Highland.

16. The jury further found that IMG and NQD were unjustly enriched as a result of their actions and business relationships with the other offending Defendants, and fixed damages for unjust enrichment as follows: $90,000 against IMG; and $90,000 against NQD.

17. Under the proof submitted, it appears the music industry requires that a high degree of trust be placed on persons and/or companies that exploit, manufacture, distribute, and sell the master records and recordings of writers, artists, and producers. In turn, these persons and/or companies are expected to accurately account for, report, and pay what is owed to the artists, publishers, and producers in royalties. In this case, there was substantial evidence from which the jury could conclude that a civil

conspiracy existed between the named Defendants to purposefully and intentionally avoid paying the producer's royalties owed to the Plaintiffs.

18. In spite of Defendants' claim of ignorance and innocence, Defendants were solely in control of the information regarding the transfers of titles and ownership of the masters, and of the sales records and licensing agreements. Defendants knew they were not making any producer's royalty payments on the George Jones masters, and tried to avoid payment by making the trail of title ownership and responsibility for payment. When questioned about their liability for payment, Defendants initially denied they owed Plaintiffs any royalties and assumed the defensive position of demanding Plaintiffs produce the documents and records to prove their claim. Defendants were aware that their records and record-keeping methods prevented any clear resolution of this problem.

19. Defendants' wrongful conduct continued for over a decade. It was ended only when Plaintiffs began their aggressive efforts to vindicate their rights and finally resulted in the filing of this lawsuit to end the wrongful withholding of producer's royalties owed to them.

20. Defendants have combined total assets of approximately $14.8 million, divided as follows: Gusto, $3,050,693 (as of December 31, 1997); GML, $1,313,312 (as of June 30, 1998); NQD, $1,653,413 (as of December 31, 1997); IMG, $6,420,000 (as of December 31, 1997); Highland $2,372,131 (as of September 30, 1998).

21. With regard to those same dates, Defendants have stockholders' equity totaling approximately $2.8 million, divided as follows: Gusto, $2,542,245; GML, $561,653; NQD, negative $212,122; IMG, negative $63,761; and Highland, negative $31,347.

22. None of the Defendants has yet had to pay a punitive damages award for this or similar conduct.[10]

23. As of the date of the punitive damages phase of trial, Plaintiff had incurred expenses of at least $345,000 in pursuing this claim.

CONCLUSIONS OF LAW

1. In Tennessee, a court may award punitive damages if it finds a defendant has acted intentionally, fraudulently, maliciously, or recklessly. Hodges, 833 S.W.2d at 901.

2. Having heard evidence concerning the events described above, the jury unanimously found by a preponderance of the evidence that the named Defendants were liable to the Plaintiffs for compensatory damages in the total amount of $737,000. Based upon the proof in the case, the Court finds there is evidence to support the jury's verdict, and the amount awarded to Plaintiffs is reasonable in view of the evidence.

The jury further found by clear and convincing evidence that said named Defendants acted intentionally, fraudulently, maliciously, or recklessly so as to subject said Defendants to punitive damages. Based upon the proof in the case, the Court finds there is evidence to support the jury's verdict.

3. In a separate, bifurcated hearing on the issue of punitive damages, the jury determined the amount of punitive damages to be assessed against the Defendants in order to punish them and to deter others from committing similar wrongs in the future. The amounts assessed by the

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[10]When asked whether he had "ever had to answer to a judge or a jury for punitive damages in any cases of this type," Hawkins answered, "Absolutely not." He also stated Highland Music had never paid punitive damages. Tr. at 1083.

jury are as follows: $250,000 against Gusto Records; $250,000 against GML, Inc.; $31,250 against Nashville Quality Duplication, Inc.; $208,500 against International Marketing Group, Inc.; and $44,500 against Highland Music, Inc., for an amount totaling $784,250.

4. It is the opinion of the Court, as discussed herein, that there is sufficient evidence in the record from which the jury could find that the Defendants engaged in either intentional, fraudulent, malicious, or reckless conduct with regard to their conspiracy to prevent Plaintiffs from discovering their entitlement to producer's royalties and the amount thereof, such that punitive damages are appropriate.

5. The Court further finds the amount of punitive damages awarded by the jury against each Defendant is reasonable in light of all the circumstances, including, without limitation, the amount of compensatory damages awarded, Defendants' financial condition, Defendants' statements of annual income and expenses, the propriety of punishing corporate defendants that have intentionally, fraudulently, maliciously, or recklessly failed to pay royalties to those entitled to receive them, and the need to punish Defendants for their unlawful conduct and to deter others from engaging in such conduct in the future. The evidence does not support Defendants' claims that (a) proof of the conspiracy was insufficient, (b) their conduct was not reprehensible, (c) the amount is excessive in light of their financial conditions, (d) they did not try to conceal their conduct, (e) Plaintiff's expenses were inflated by their counsel's haphazard conduct, (f) there is no proof they profited from their conduct, and (g) Defendants were

unaware of any harm they were causing.[11] However, because the jury did not hear any evidence regarding Thomas, the Court did not consider this case in reaching its decision in this case. Similarly, the Court has given no consideration to the numerous other cases in which the Defendant has been charged with similar wrongful conduct.

6. The Court finds no evidence that the jury was motivated by passion or prejudice or acted improperly in any way.

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[11]Plaintiffs moved the Court to take judicial notice of Thomas v. Gusto Records, Inc., 939 F.2d 395 (6th Cir. 1991), aff'g No. 3:87-0975 (M.D. Tenn. May 1, 1990) (Higgins, J.), cert. denied, 502 U.S. 984 (1991). (The district court's opinion is hereinafter cited as the "Higgins Mem."). In Thomas, recording artists B.J. Thomas, Gene Pitney, and the Shirelles sued Gusto and GML for failure to pay royalties on masters the companies owned in the 1970s an 1980s. Following a bench trial, the district court awarded Plaintiffs damages totaling $843,209.89 (plus prejudgment interest), to be divided as follows: $177,299.17 to Thomas; $187,762.44 to Pitney; and $478,148.28 to the Shirelles.

In support of this award, the district court found that (1) Gusto's "unorthodox" and "idiosyncratic" record-keeping practices involved keeping no general or subsidiary ledgers, no sales records for individual items, no perpetual inventory, and no record of any sort to document the relation of any income to a particular master or artist; (2) the "pay card" system by which Gusto purported to keep track of royalties due was completely inadequate and, because of the lack of inventory records, it was unverifiable; (3) the missing records are the sort of routine documentation upon which a reputable accountant would normally insist; and (4) such practices made the record-keeping a potential "instrument of fraud and deceit." Higgins Mem. at 7-8. See also Thomas, 939 F.2d at 401 (quoting the district court's opinion). Further, Judge Higgins noted the defendants had withheld certain records from the plaintiffs and the court. Higgins Mem. at 9. Through these interwoven methods of obfuscation and deceit, "the defendants effectively put an end to any hope of obtaining a complete and accurate determination of just what it is that the defendants owe the plaintiffs," forcing the court "to traverse the misty realm of reasonable estimates." Id.

In accordance with these findings and the verdict of the jury, judgment is hereby entered in favor of Plaintiffs for punitive damages in the amount of $784,250, to be apportioned as set forth in Paragraph No. 3 of these conclusions.

It is so ORDERED.

"s/Robert L. Echols"
ROBERT L. ECHOLS
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

CIVIL ACTION NO. 3:94-1090

[ENTERED: August 4, 1999]

DONALD M. DAILY, et al.	)
	)
Plaintiffs,	)
	)
v.	)
GUSTO RECORDS, INC., et al.	)
	)
Defendants.	)

JUDGE ROBERT ECHOLS

JUDGMENT IN A CIVIL CASE

- **Jury Verdict. This action came before the Court for a trial by jury.**

The issues have been tried and the jury has rendered its verdict.

- **Decision by Court. This action came to trial or hearing before the Court.**

The issues have been tried or heard and a decision has been rendered.

This document was entered on the docket in compliance with Rule 58 and/or Rule 79(1) FRCP on 8/4/99 By "s/TRC"

IT IS ORDERED AND ADJUDGED that the jury found as follows:

1. The jury found that Harold "Pappy" Daily did produce George Jones master recordings under which the Plaintiffs are claiming producer's royalties.

2. The jury found that the Defendants, Gusto Records, Inc., GML, Inc. and Highland Music, did breach their contractual obligation to the Plaintiffs to pay producer's royalties. The jury found that the Defendants, Nashville Quality Duplication, Inc. and International Marketing Groups, Inc., did not breach their contractual obligation to Plaintiffs to pay producer's royalties.

3. The jury found that the Plaintiffs did not waive their right to receive producer's royalties from any of the Defendants.

4. The jury found that the Plaintiffs are entitled to damages for breach of contract in the following amounts:

As to Defendant, Gusto Records, Inc. $260,000.00
As to Defendant, GML, Inc. $108,000.00
As to Defendant, Highland Music, Inc. $ 24,000.00

5. The jury found that the Plaintiffs are entitled to judgment on their claim of unjust enrichment as to the Defendants, Nashville Quality Duplication, Inc. and International Marketing Group. Inc.

6. The jury found that the Plaintiffs are entitled to damages on their claim of unjust enrichment in the following amounts:

Nashville Quality Duplication, Inc. $90,000.00
International Marketing Group, Inc. $90,000.00

7. The jury found that the Plaintiffs are entitled to judgment against the Defendants under the theory of conspiracy.

8. The jury found that the Defendants, Gusto Records, Inc., GML, Inc., Nashville Quality Duplication, Inc., International Marketing Group, Inc. and Highland Music, Inc., were each involved in this agreement, common plan, or scheme.

9. The jury found that the Plaintiffs are entitled to damages in the amount of $165,000.00 for the Defendants' conspiracy. Each of the Defendants found to be a party to the conspiracy shall be jointly and severally liable for this amount.

10. The jury found by clear and convincing evidence that the Defendants, in conspiring against the Plaintiffs, acted intentionally, recklessly, maliciously or fraudulently. As such, the Plaintiffs are entitled to punitive damages.

IN ACCORDANCE WITH THE VERDICT OF THE JURY, JUDGMENT IS HEREBY ENTERED IN FAVOR OF THE PLAINTIFFS, DONALD M. DAILY AND HAROLD W. DAILY, JR., IN THE TOTAL AMOUNT OF SEVEN HUNDRED THIRTY-SEVEN DOLLARS ($737,000.00). A SEPARATE JUDGMENT FOR THE AWARD OF PUNITIVE DAMAGES WILL BE ENTERED BY THE COURT.

August 3, 1999
DATE

ROGER A. MILAM, CLERK
"s/Marcia E. Knoch"
BY Marcia E. Knoch
DEPUTY CLERK

Supreme Court, U.S.
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No. 01-992

In The

Supreme Court of the United States

GUSTO RECORDS, INC., GML, INC.,
NASHVILLE QUALITY DUPLICATION, INC.,
INTERNATIONAL MARKETING GROUP, INC.,

Petitioners,

v.

DONALD M. DAILY and HAROLD W. DAILY, JR.,
Individually and as Independent Co-Executors of The
Estates of Mr. and Mrs. Harold W. "Pappy" Daily,
GLAD MUSIC COMPANY,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit's decision in an unreported order denying a Petition for Rehearing and re-affirming punitive damages specific to each of four defendants ranging from $31,250 to $250,000 after the reduction of compensatory damages violates due process.[1]

2. Whether the Petitioners waived any due process complaint as to the amount of punitive damages for failure to raise any due process complaint until their Petition for Rehearing in the Court of Appeals.

---

[1] The Petitioners' Question Presented incorrectly states that the ratio complained of is $1 to $739,750. PETITION at i. The punitive damage awards were specific to each Petitioner and apportioned as follows: G.M.L., Inc. $250,000; Gusto Records, Inc. $250,000; Nashville Quality Duplication, Inc. $31,250; and International Marketing Group, Inc. $208,500. APP. 37-39. No single defendant is liable for $739,750 in punitive damages.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Respondents Donald M. Daily and Harold W. Daily, Individually and as Independent Co-Executors of the Estates of Mr. and Mrs. Harold "Pappy" Daily and Glad Music Company submit that there are no parent or publicly held companies that own more than 10% of the company's stock.

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STATEMENT OF THE CASE

Respondents, Donald M. Daily and Harold W. Daily, Individually and as Independent Co-Executors of the Estates of Mr. and Mrs. Harold W. "Pappy" Daily and Glad Music Company, respectfully urge the Court to deny Petitioners' Petition for Writ of Certiorari to review the order on Petition for Rehearing of the United States Court of Appeals for the Sixth Circuit. The order does not conflict with decisions of other circuits, is fully consistent with Tennessee law, is fully consistent with the decisions of this Court, and does not otherwise raise important constitutional or federal questions warranting this Court's review. Further, any constitutional complaint as to punitive damages has been waived.

This case has all the attributes of a case in which punitive damages are justified and none of the attributes which justify this Court's review. This Brief in Opposition is filed to correct misstatements made in the Petition for Writ of Certiorari, such as the incorrect ratio stated in Petitioners' Question Presented, and to point out procedural barriers which will prevent the issues from being properly presented to this Court for review.

STATEMENT OF FACTS

This case involves a malicious and fraudulent scheme to avoid payment of royalties coupled with a history of bad faith. The conspirators used trickery and deceit to

achieve their goals. APP. 2, 25, 35-38.[2] It is incorrect for Petitioners to say that no court has articulated the reprehensible conduct that the Petitioners engaged in which entitles the Respondents to punitive damages.[3]

> "The proof adduced at trial showed Defendants benefitted from the exploitation of George Jones masters produced by Pappy Daily by entering into an agreement to mask the lawful title and ownership of the masters through a complex web of business relationships and through the use of irregular and obfuscatory accounting methods." APP. 32. "Under the proof submitted, it appears the music industry requires that a high degree of trust be placed on persons and/or companies that exploit, manufacture, distribute, and sell the master records and recordings of writers, artists, and producers. In turn these persons and/or companies are expected to accurately account for, report, and pay what is owed to the artists, publishers, and producers in royalties. In this case, there was substantial evidence from which a jury could conclude that a civil conspiracy existed between the named Defendants to purposefully and intentionally avoid paying the producer's royalties owed to the Plaintiffs." APP. 34.

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[2] "APP." refers to the Appendix attached to the Petition for Writ of Certiorari.

[3] The Court of Appeals opinion addressed facts which support the punitive damage findings, but not in response to a constitutional due process challenge because that issue was never raised in the appellate briefs. APP. 5-28. In the order denying the Petition for Rehearing, the Court of Appeals provided analysis on the newly raised constitutional due process claim. APP. 1-4.

"Furthermore, when viewed in toto, the record shows clear and convincing evidence that his conduct was intentional, reckless, malicious, and/or fraudulent such that punitive damages are justified. The intentional nature of this conduct can be reasonably inferred from the following facts. Defendants knew they were in sole control of the information regarding the transfers of titles and ownership of the masters and of the sales records and licensing agreements. They knew they were not making any producer's royalty payments on the masters at issue, and they tried to avoid payment by masking the trail of title ownership and responsibility for payment. When questioned about their liability for payment, Defendants initially denied they owed Plaintiffs any royalties and assumed the defensive position of demanding Plaintiffs produce the documents and records to prove their claim. Defendants were aware that their records and record-keeping methods prevented any clear resolution of this problem. At trial, one of the Defendants candidly admitted that producer's royalties were owed to Plaintiffs on some of the masters, but it could not determine how much and on which masters." APP. 24-25, quoting MEMO OP. JA[4] 243.

"Defendants' wrongful conduct continued for over a decade. It was ended only when Plaintiffs decided to spend the substantial amount of money required for an investigation and vigorous prosecution of this action. This began their aggressive efforts to vindicate their rights

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[4] "JA" refers to the Joint Appendix in the Court of Appeals.

> and to end the wrongful withholding of producer's royalties owed to Plaintiffs by the Defendants." MEMO OP. JA 243; summarized in APP. 35.

The fraudulent scheme was complex and requires a basic overview of the evidence. The Petitioners/Defendants are intertwined companies owned by two individuals, Mr. Gayron "Moe" Lytle and Mr. Stephen Hawkins. Lytle is the president, and sole shareholder of G.M.L., Inc. ("GML"), Gusto Records, Inc. ("Gusto"), International Marketing Group, Inc. ("IMG"), and Nashville Quality Duplication, Inc. ("NQD"). APP. 10; JA 520-521. All of the Lytle entities operate at the same address. APP. 10; JA 520-521.

Hawkins is the sole owner of Highland Music, Inc. APP. 9; JA 421. Hawkins uses an office at Lytle's place of business. JA 439. Highland's secretary was also Lytle's Certified Public Accountant. JA 496. Highland started out in this litigation with the same attorney as Gusto/GML. JA 441-442. Highland Music did not exist until it made its deal with Gusto/GML in 1987. APP. 9; JA 442.

Highland does business differently with Gusto/GML than with any other business entity. APP. 10-11; JA 431. Generally, with any other company, Highland pays a per-track rate as opposed to Gusto/GML's percentage of a particular sale. APP. 11; JA 431. The license agreements between Gusto/GML and Highland stated they were exclusive between the companies. JA 533; 962, 965, 969. However, Lytle testified that they were not exclusive if he decided they were not exclusive. APP. 9; JA 533. There were numerous credits and accounting transfers between the companies that were unexplained. Exhibit 150 is a

credit memo for $363,000 from Highland to IMG dated January 12, 1994. Hawkins could not testify as to the reason for this credit memo – it could be for product or a pricing adjustment. APP. 11; JA 492. The license agreement between GML/Gusto and Highland was not standard for the industry. The indemnity which usually runs from the owner of the masters to the licensee to guarantee that the owner actually holds title to the masters, ran the opposite direction in the Defendants' agreement. APP. 9; JA 640.

There was no paperwork formalizing the alleged transfers and agreements between the companies. APP. 9-10; JA 558-560. The Defendant companies were organized in such a fashion as to cause the George Jones masters in question to be passed back and forth, like a shell game, each company in turn skimming off revenue that was never reported to the Daily's. JA 522-537, 561-562, 575-583.

The Defendants had a history of bad faith which was demonstrated to the jury. For example, when Hawkins flatly denied ever participating with Lytle in efforts to avoid other royalty obligations, he was impeached with the fact that Hawkins (individually) and Highland had been found in contempt of court because they "deliberately aided and abetted Gusto Records and GML in violating an express term of a prior court order" prohibiting the exploitation of certain master recordings. APP. 22, 33.

There are several events of misconduct which occurred over the years which contributed to the punitive damages award. For example, in 1982, Mr. Lee Trimble, who worked for Lytle, told Daily that Lytle was in the process of investigating and demanding assurances that

any producer's royalties on George Jones masters would be satisfied. JA 555-556, 2175. Lytle knew that Trimble had previously worked for Daily and Daily would trust Trimble's assurances. JA 551-552, 555-557. The Court of Appeals opinion is referring to Trimble when it speaks of the "intermediary" that Gusto sent to negotiate with Daily. APP. 8. Petitioners' reference to its negotiations with Respondents over the years as "logically inconsistent" with the conspiracy finding ignores the fact that the negotiations were used to perpetrate the fraud. PET. at 8.

Defendants' reprehensible conduct did not cease even during the litigation. The masters changed hands without documentation at least twice during the litigation – first in 1994, and again in 1997. In 1994, after Plaintiffs had filed suit, GML sold the masters in question back to Gusto without any written agreement to document the transfer. APP. 12; JA 558. Lytle discussed the transaction with his CPA firm and they made some kind of accounting entry and the transfer occurred. APP. 12; JA 559. He did not know how much debt that Gusto owed GML after the transaction. JA 559.

On December 4, 1997, during the pendency of this litigation, Gusto sold the Springboard Catalog to Catalogue Music, Ltd. – another Hawkins entity. APP. 12; JA 545, 1940. Lytle did not give the Daily's notice of the sale, even though it affected the George Jones masters at issue and for which the Daily's sought recission. App. 12; JA 547. The agreement was for $3.5 million. APP. 12; JA 1940.

On December 19, 1997, several days after the deal was signed, Lytle testified in his deposition in this case that Gusto still owned the Springboard masters. JA 544.

Plaintiffs finally learned of the sale in June 1999, about a month before trial. App. 12; JA 655. Lytle took the position again at trial that Gusto owned the masters as of December 19, 1997. JA 544. The jury considered this and other evidence in its evaluation of punitive damages. The trial court further found that Defendants' failure to disclose the sale to plaintiffs was sanctionable. App. 12.

This Court does not require lower courts to articulate their reasons for upholding punitive damage awards. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 433, 465, 113 S.Ct. 2711, 2724, 125 L.Ed.2d 366 (1993). However, the lower courts in this case have done just that. *See*, App. 29-39 [Dist. Ct.'s Findings of Fact and Conclusions of Law]. To recite every fact from the record which supports the punitive damage awards would result in opinions at least twice as long with no additional jurisprudential value.[5] The record and the lower courts' decisions support the jury's punitive damage awards.

REASONS WHY PETITION SHOULD BE DENIED

I. The Sixth Circuit's decision does not violate due process and the Court did not depart from the accepted and usual course of judicial proceedings.

The conspiracy to defraud claim which supports the punitive damage awards is a state law claim. State law

[5] The Court of Appeals and the District Court recognized that this case had little jurisprudential value and ordered the opinions unpublished.

principals govern whether punitive damages are available for a state law claim and the review of the size of jury verdicts is a matter of federal law. *Donavan v. Penn Shipping Co., Inc.*, 429 U.S. 648, 649, 97 S.Ct. 835, 836-37, 51 L.Ed.2d 112 (1977).

A. Tennessee law supports punitive damage awards based upon nominal damage awards.

Petitioners argue about the Sixth Circuit's interpretation of Tennessee's common law – an issue better left to the Tennessee Supreme Court. In Tennessee, punitive damages are available upon the finding of injury, regardless of whether compensatory damages are awarded. *Whittington v. Grand Valley Lakes, Inc.*, 547 S.W.2d 241, 242 (Tenn. 1977); *Oakley v. Simmons*, 799 S.W.2d 669 (Tenn. Ct. App. 1990). Thus, the punitive damage awards based upon nominal damages is supported by Tennessee law.

Petitioners' reference to the *Braswell* case is misleading. *Braswell v. Carothers*, 863 S.W.2d 722 (Tenn. Ct. App. 1993). *Braswell* states the general rule that a tort must be complete to be actionable. *Braswell* does not address the issue of whether, in an intentional and evil motive type case, injury may be found without a finding of compensatory damage. That issue is governed by the Tennessee Supreme Court in *Whittington, supra.*

B. "Ratio" analysis is given little weight in nominal damage cases.

This Court has recognized that in cases like this involving malicious and fraudulent schemes to steal royalties coupled with a history of bad faith, a dramatic disparity between actual damages and punitive damages is not controlling. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed.2d 366 (1993) (526:1 ratio held not excessive). This Court was careful to make accommodations for cases such as this:

> [L]ow awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.

BMW of North America v. Gore, 517 U.S. 559, 582, 116 S.Ct. 1589, 1602, 134 L.Ed.2d 809 (1993). When the injury has occurred, but is not quantifiable, there is no necessary correlation between the amount of punitive damages that may be properly assessed and the amount of compensatory damages.

Other United States Courts of Appeals and State Supreme Courts that have addressed the issue have disposed of it in a similar fashion. *See, e.g., Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1347-1351 (Fed. Cir.), *cert. denied*, 122 S.Ct. 580 (2001) ($520 incidental damages supported punitive damages of $20 million); *American Business Interiors v. Haworth, Inc.*, 798 F.2d 1135, 1136 (8th Cir. 1986)

(upholding punitive damages of $250,000 based upon $1 nominal damages); *Whittington*, 547 S.W.2d at 242 (punitive damages upheld where compensatory damages were denied); *Walker v. Cleary Petroleum Corp.*, 421 So.2d 85 (Ala. 1982); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wisc. 1997) (nominal damages of $1 supported punitive damages of $100,000). When nominal damages are awarded the ratio factor has little or no significance. *Edwards v. Jewish Hospital of St. Louis*, 855 F.2d 1345, 1352 (8th Cir. 1988) (appellant was not entitled to reduction of punitive damage award from $25,000 to reflect reduction in actual damages from $50,000 to $1.00 nominal damages). Nominal damages support a much higher ratio of punitive damages.

Under federal analysis, the constitutionality of a punitive damages award is not simply a matter of numbers or ratios. *Tronzo*, 236 F.3d at 1350. The constitutionality of a punitive damage award involves the consideration of three "guideposts," only one of which is the ratio of compensatory to punitive damages. The court must also consider the reprehensibility of the conduct and any civil or criminal penalties for similar conduct. And of these three guideposts, it is not the ratio of the punitive to compensatory damages, but the reprehensibility of the conduct that is deemed by this Court to be "the most important indicium of the punitive damages award." *BMW of North America*, 517 U.S. at 575, 116 S.Ct. at 1599. Petitioners focus their argument solely on the ratio analysis, but their discussion of this factor is too simplistic. The guidepost articulated by this Court was the ratio of punitive damages to "actual and *potential* damages." *Id.* at 582; *Tronzo*, 236 F.3d at 1350 (ratio after

reduction to compensatory damages went from 2.8 to 1 to 38,000 to 1 – punitive damages upheld).

The jury's separate findings imposing punitive damages in differing amounts for each specific defendant reflect a careful assessment of the gravity of each defendant's conduct and other relevant factors, and none of these awards may be said to be the result of passion or prejudice. The jury considered the evil motives and the complicated scheme composed to effect the fraud. The jury was further instructed to consider nine other factors in determining the amount of punitive damages including (1) Defendants' financial affairs, financial condition and net worth; (2) the nature and reprehensibility of Defendants' wrongdoing, which the court defined as the impact of Defendants' conduct on Plaintiffs and the relationship of Defendants to Plaintiffs; (3) Defendants' awareness of the amount of harm being caused and its motivation in causing it; (4) the duration of Defendants' misconduct and whether Defendants attempted to conceal the conduct; (5) the expense Plaintiffs bore in attempting to recover their losses; (6) whether Defendants profited from the activity and, if so, whether the punitive damages award should be in excess of the profit in order to deter similar future behavior; (7) whether, and the extend to which, Defendants have been subjected to previous punitive damages awards based upon the same wrongful act; (8) whether, once the misconduct became known to Defendants, Defendants took remedial action or attempted to make amends by offering a prompt and fair settlement for actual harm caused; and (9) any other circumstances shown by the evidence that bear on determining the proper amount of the punitive damages

award. App. 29-30. The sufficiency of the evidence on any of these nine factors has not been challenged. App. 25.

The lower courts reviewed and considered the reprehensible nature of the Petitioners' fraudulent scheme involving trickery and deceit. The Court of Appeals made short work of "the difference between the punitive damage award and other civil or criminal penalties imposed for comparable conduct" factor. There were over 200 George Jones masters at issue. JA 404, 512, 695, 743, 1967-2070, 2176, 3401, 2449-2453. "It is not difficult to conceive that defendants' conduct, if compared on a per violation basis [$1,000 per violation under the Tennessee Consumer Protection Act], would result in substantial civil penalties comparable to the punitive damages awarded here." App. 3. The Petition for Writ of Certiorari should be denied.

II. Waiver of complaint as to amount of punitive damages.

The jury awarded $165,000 in compensatory damages on the conspiracy claim for which all five[6] defendants were jointly and severally liable. The jury also awarded punitive damages apportioned separately against each of the four Petitioners as follows:

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[6] Highland Music Company was also a defendant found jointly and severally liable for the $165,000 in conspiracy damages and found liable for $44,500 in punitive damages. Highland has not joined in the Petition for Writ of Certiorari.

DEFENDANT	PUNITIVE DAMAGES	RATIO TO $165,000 (Joint and Several)
G.M.L., Inc.	$250,000	1.51 to 1
Gusto Records, Inc.	$250,000	1.51 to 1
NQD, Inc.	$31,250	.19 to 1
IMG, Inc.	$208,500	1.26 to 1

Not surprisingly, Petitioners chose not to complain of excessiveness of the punitive damage awards of these modest ratios on appeal.[7] The only issue stated or argument raised in the Brief of Appellants in the Court of Appeals was that "Plaintiffs' claim for punitive damages, therefore, should fail because the Gusto Defendants are entitled, for the reasons set forth above, to judgment as a matter of law on the conspiracy claim." BRIEF OF APPELLANTS at 46-47. The only relief requested from the Court of Appeals was "to reverse the judgment and dismiss the case." BRIEF OF APPELLANTS at 48. Now, after the Court of Appeals reduced the compensatory damages for conspiracy to $1, Petitioners suggest that the jury's punitive damage awards should not be upheld as excessive under the Fourteenth Amendment. The first time Petitioners challenged the *amount* of punitive damages was in the Petition for Rehearing after the Court of Appeals rendered its opinion.[8] The constitutional challenge raised for

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[7] The Petitioners did include a complaint of "excessiveness" in their Memorandum of Law in Support of their Second Motion for Judgment as a Matter of Law or, in the Alternative for New Trial. However, Petitioners made no mention, even then, of a federal constitutional challenge.

[8] The Petitioners did not, "challenge the district court's acceptance of the punitive damages awards, or its findings on

the first time in the Petition for Rehearing has been waived. *See Adams v. Robertson*, 520 U.S. 83, 89 n.3, 117 S.Ct. 1028, 1031 n.3, 137 L.Ed.2d 203 (1997) (federal due process claim raised for the first time in a petition for rehearing was not properly presented to the court below and writ of certiorari was dismissed as improvidently granted). *See also TXO Production Corp.*, 509 U.S. at 462-64, 113 S.Ct. at 2723 (declined to review constitutional attack to punitive damage award which was not properly presented to the court below); *Hidden Oaks Limited v. City of Austin*, 138 F.3d 1036, 1045 n.6 (5th Cir. 1998) (issue raised for the first time in reply brief is waived); *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1347-1351 (Fed. Cir.), *cert. denied*, 122 S.Ct. 580 (2001) (where appellant did not challenge *amount* of punitive damages, it could not challenge the ratio of punitive damages to compensatory damages when the compensatory damages were reduced); *Mason v. Oklahoma Turnpike Authority*, 182 F.3d 1212, 1214 (10th Cir. 1999) (constitutional objection to excessiveness of punitive damages waived when only common-law challenge was raised on appeal); F.R.A.P. 28 (briefs must include a statement of the issues presented for review).

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the specific factors considered by the jury in determining the proper amount to be awarded." APP. 25.

CONCLUSION

Respondents respectfully request this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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